Supreme Court, U. S.
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IN THE

Supreme Court of the United States
OCTOBER TERM, 1977

NO. 77-391

E. B. BURGETT AND WINNIE BURGETT, *Petitioners*

v.

THE FEDERAL LAND BANK OF WICHITA, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

Page

OPINIONS BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3

STATEMENT 3

REASONS FOR DENYING THE WRIT 6

I. The Questions Presented by Petitioners Were Not Raised in the New Mexico Courts, Thus Prohibiting Jurisdiction in the United States Supreme Court 6

II. New Mexico's Substituted Service Statute Complies With the Due Process Requirements of the Fourteenth Amendment to the United States Constitution 9

III. Service on the "Usual Place of Abode" Satisfies United States Constitutional Due Process 12

CONCLUSION 15

APPENDICES:

APPENDIX A 1a

APPENDIX B 4a

CITATIONS

Page

United States Supreme Court Cases Cited:

1. *Adler v. Board of Education*, 342 U.S. 485 (1952) 8
2. *Beck v. Washington*, 269 U.S. 541 (1962) 8
3. *Blackmer v. United States*, 284 U.S. 421 (1932) ... 13
4. *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673 (1930) 8
5. *Cardinale v. Louisiana*, 394 U.S. 437 (1969) 6
6. *Earle v. McVeigh*, 91 U.S. 398 (1876) 10, 14
7. *Live Oak Ass'n. v. Railroad Comm.*, 269 U.S. 354 (1926) 7
8. *Lynch v. New York ex rel. Pierson*, 293 U.S. 52 (1934) 7
9. *McDonald v. Mabee*, 243 U.S. 608 (1917) 9, 10
10. *Milliken v. Meyer*, 311 U.S. 457 (1940) 10, 13
11. *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313 (1930) 8
12. *Mullane v. Central Hanover Bank and Trust*, 339 U.S. 306 (1950) 9
13. *Nations v. Johnson*, 65 U.S. (24 How.) 628 (1861) 10
14. *New York ex rel. Bryant v. Zimmerman*, 233 U.S. 658 (1914), 278 U.S. 63 (1928) 7

Citations Continued

Page

15. *New York Central and H. R. Co. v. New York*, 186 U.S. 269 (1902) 7
16. *N.L.R.B. v. Seven-Up Co.*, 344 U.S. 344 (1953) 8
17. *Oxley v. Butler County*, 166 U.S. 648 (1897) 6

Federal Court Cases Cited:

1. *First National Bank & Trust Co. of Tulsa v. Ingerton*, 207 F.2d 793 (10th Cir. 1953) 10

State Cases Cited:

1. *Decker v. Gwinn*, 20 S.E. 240 (1894) 9
2. *Gunning Light & Supply Co. v. Gunning Electric Co.*, 100 A.2d 495 (1963) 10
3. *Holtberg v. Brommersbach*, 52 N.W. 766 (1952) 10
4. *John Hancock Mut. Ins. Co. v. Corley*, 83 P.2d 221 (1938) 9
5. *Nelson v. Chicago B. & Q. R. Co.*, 80 N.E. 109 (1907) 9, 13
6. *Rash v. American Federation of Labor*, 116 N.W. 2d 119 (1962) 10
7. *Spiegelman v. Birch*, 129 S.E. 2d 119 (1963) 10
8. *Williamson v. Taylor*, 122 S.E. 530 (1924) 9, 11

New Mexico Cases Cited:

1. *Bell v. Gaylord*, 6 N.M. (Gild.) 227 (1891) 10, 11, 13
2. *Federal Land Bank of Wichita v. Burgetts*, 90 N.M._____ (1977) 10, 11

Citations Continued

iv

		Page
3.	*Houden v. Hubbell*, 80 N.M. 764 (1969)	10, 11
4.	*Household Finance Corporation v. McDevitt* 84 N.M. 465 (1973)	10, 11
5.	*Spielgelberg v. Sullivan*, 1 N.M. 575 (1873) ...	10, 11
6.	*Vann Tool Co v. Grace*, 90 N.M. _____ (1977) 16 N.M. Bar Bull. No. 21 at 1905	10 11 12
7.	*Vigil v. Pradt*, 5 N.M. (Gild.) 161 (1889)	10, 11

United States Constitution Cited:

1.	Fourteenth Amendment	2, 3, 6

Federal Statutes Cited:

1.	28 U.S.C. Section 1257 (3)	6
2.	Rules of United States Supreme Court 23 (1) (f)	6

New Mexico Constitution Cited:

1.	Article II Section 18	3, 7

New Mexico Statutes Cited:

1.	N.M.S.A., 1953, Sec. 21-1-1 (4) (e) (1)	2, 3, 8, 14

IN THE

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NO. 77-391

E. B. BURGETT AND WINNIE BURGETT, *Petitioners*

v.

THE FEDERAL LAND BANK OF WICHITA, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions are as stated in the Petitioners' Brief.

JURISDICTION

Respondent maintains this Court lacks jurisdiction as the issues raised in the Petition were not presented or ruled upon by the New Mexico Supreme Court.

QUESTIONS PRESENTED

Respondent, The Federal Land Bank of Wichita (hereinafter, Bank) filed suit on November 18, 1975, seeking judgment on a promissory note and foreclosure of the mortgage securing this note. Judgment on the note was sought against E. B. Burgett, his wife, Winnie Burgett, his son, Everett Dale Burgett, and two closely held New Mexico corporations controlled by them as makers of the note. The mortgage sought to be foreclosed was given as securi-

ty for the note by E. B. Burgett and his wife as sole record owners of the subject property, in favor of the respondent bank. The mortgage and note were signed by E. B. and Winnie Burgett, his wife, with the note being also signed by Everett Dale Burgett as guarantor.

On November 19, 1975, substituted service was made on E. B. Burgett and his wife by affixing copies of the Summons and Complaint to the door of their alleged "usual place of abode" pursuant to statutory authority in N.M.S.A. 1953, Section 21-1-1 (4) (e) (1) which provides in pertinent part:

> "If the defendant be absent, service may be made by delivering a copy of the process or other papers to be served, to some person residing at the usual place of abode of the defendant, over fifteen (15) years of age; and if no such person be found willing to accept a copy then service shall be made by posting such copies in the most public part of the defendant's premises."

A Default Judgment was entered on August 5, 1976, against E. B. and Winnie Burgett (hereinafter the Burgetts) for their failure to appear and answer the Bank's complaint.

The Burgetts filed a motion to set aside the Default Judgment on the grounds that service of process was insufficient, the court lacked personal jurisdiction, and neither notice nor opportunity to be heard had been given.

The District Court of Otero County denied the Burgetts' motion and the Supreme Court of New Mexico affirmed this decision. The questions presented are:

1. Whether the question of whether 21-1-1 (4) (e) (1) N.M.S.A. (1953) conforms to the due process standards of the Fourteenth Amendment to the United States Constitution was properly raised in the New Mexico Supreme Court in order to provide jurisdiction for this Court to review the New Mexico Supreme Court decision.

2. Whether N.M.S.A., (1953) Section 21-1-1 (4) (e) (1), which permits service by "posting" a copy of the Summons and Complaint on the most public part of the defendants' "premises" is reasonably calculated to give adequate notice to residents of New Mexico as required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

3. Whether the construction placed on the phrases "premises" and "usual place of abode" by the New Mexico courts, which permits a defendant to be served at a residence from which he is temporarily absent is reasonably calculated to give adequate notice of the commencement of judicial proceedings as required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The New Mexico statute involved in this case is found at New Mexico Statutes Annotated, (1953) 21-1-1 (4) (e) (1) and not as cited by Petitioners. The appurtenant United States Constitutional provision involved is adequately set forth in the Petition.

The New Mexico State Constitutional provision involved is set forth in Article II, Section 18, of the Constitution of New Mexico, found in Volume 1, N.M.S.A., (1953) and reads as follows:

> "No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied the equal protection of the laws."

STATEMENT

On November 18, 1975, the Bank filed its complaint against the Burgetts. On November 19, 1975, Emmett B. Owens attempted to serve process on the Burgetts at a

house owned and lived in by them located between Cloudcroft and Mayhill, New Mexico. The Burgetts lived and resided in this house for a great number of years and at the time of attempted service by Mr. Owens, were still residing in the house, although temporarily in Artesia, New Mexico.

When Mr. Owens attempted to serve process, he found no one at the house located between Cloudcroft and Mayhill, New Mexico. After personally serving Everett Dale Burgett, guarantor to the promissory note to the mortgage being forclosed, the son of E. B. Burgett and Winnie Burgett, and their agent and manager of their businesses being operated from the premises and property being forclosed, Mr. Owens asked him where his parents could be found; Everett Dale Burgett refused to disclose his parents whereabouts, giving no reason for his refusal.

Mr. Owens then went to Cloudcroft, New Mexico, and asked Rex Briscoe, a police officer, where the Burgetts lived. Mr. Briscoe directed Mr. Owens to the house where the Burgetts lived and which they owned between Cloudcroft and Mayhill, New Mexico. Officer Briscoe informed Mr. Owens that he was sure the Burgetts still resided at this house that he had described because he had seen E. B. Burgett recently at the post office in Cloudcroft, New Mexico. Upon returning to the Burgett house, Mr. Owens determined the most public door of the Burgett domicile and home, knocking on the door and finding no one present, he attached two copies of the Summons and Complaint to the back door of the Burgetts' home. No other method or manner of service on the Burgetts was made or attempted. E. B. and Winnie Burgett claimed they were not advised by their son and were not otherwise made aware of the law suit, although they had been served in the most reasonably probable manner to apprise them of the foreclosure suit.

On January 20, 1976, the default of E. B. and Winnie Burgett was entered by order of the District Court of Otero County. On July 15, 1976, summary judgment was entered against Everett Dale Burgett, who appeared pro se. On August 5, 1976, the Final Decree of the District

Court was entered granting respondent default judgment against the Burgetts and summary judgment against Everett Dale Burgett.

On August 26, 1976, the Burgetts received by certified mail, return receipt requested, a copy of the judgment in this case. Immediately upon receiving this judgment, the Burgetts turned the judgment over to their son, asking him to take care of the matter. On September 10, 1976, a motion to set aside the judgment was filed predicated on the grounds that "no proper service of process was ever had on the Burgetts", claiming they no longer resided at the house between Cloudcroft and Mayhill, New Mexico, on the date and time of service.

After an evidentiary hearing on the Motion, the District Court made findings of fact and conclusions of law and denied the Burgetts' motion to set aside the judgment, holding that the Burgetts were properly served. The findings of fact and conclusions of law relied on by the District Court included: the Burgetts were each served process on November 19, 1975, by attachment of two sets of summons and complaints, enclosed in a clear plastic bag, to the most commonly used door of the premises and usual place of abode of E. B. Burgett and Winnie Burgett; that the Burgetts were temporarily in Artesia, New Mexico; that Everett Dale Burgett was the son, agent, and manager of the business affairs of E. B. Burgett and Winnie Burgett, and had been responsible and attended to all the legal and business affairs of E. B. Burgett and Winnie Burgett; and conclusions of law that service of process was properly made upon both the Burgetts by posting two summons with copy of complaint attached to the most public door and most public part of the premises of the Burgetts; a conclusion that Everett Dale Burgett, son, manager and agent for the Burgetts, was personally served with a summons with a copy of the complaint attached, and had full knowledge of the action on file herein.

Following denial of the motion, the Burgetts appealed to the New Mexico Supreme Court. The Burgetts' appeal specifically challenged all of the District Court's findings

and conclusions of law, arguing that there was not substantial evidence upon which the Court had based its findings and conclusions of law, including the conclusion that service of process was properly made on them.

The decision of the Supreme Court of New Mexico affirming the decision of the District Court was without opinion, merely holding that there was substantial evidence supporting all of the findings and conclusions made by the trial court. The Burgetts' Motion For Rehearing was also denied by the Supreme Court of New Mexico, again without opinion.

ARGUMENT

Point 1. THE QUESTIONS PRESENTED BY PETITIONERS WERE NOT RAISED IN THE NEW MEXICO COURTS, THUS PROHIBITING JURISDICTION IN THE UNITED STATES SUPREME COURT.

The question of whether New Mexico's service of process statute, as it relates to substituted service, violates the due process clause of the Fourteenth Amendment to the United States Constitution either on its face or as construed, was not presented to the New Mexico Supreme Court, and therefore this Court has no jurisdiction to review those questions.

Petitioners seek to invoke this Court's jurisdiction under 28 U.S.C. Section 1257 (3). It is a precondition to the existence of jurisdiction under this section that the federal question upon which review is sought was presented to and ruled upon by the state court. *Cardinale v. Louisiana*, 394 U.S. 437. The assertion of a federal right must have been clear. This Court's jurisdiction does not arise from mere inference. *Oxley Stove Co. v. Butler County*, 166 U.S. 648, 655. Rule 23 (1) (f) of the United States Supreme Court places the burden on Petitioners to show the federal questions were raised, how they were raised and the manner in which they were passed upon by the state court. Petitioners have not met any of these requirements.

Petitioners do not point to anything in the record to indicate that any federal questions were raised at trial, on appeal to the New Mexico Supreme Court, or in the Motion For Rehearing filed in the New Mexico Supreme Court. Briefs before state courts are not ordinarily a part of the record filed with the Supreme Court and cannot be used to establish that a federal question was raised. *Live Oak Ass'n v. Railroad Commission*, 269 U.S. 354, 357-8; *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54 (1934). Even if we assume that references to briefs were proper, it goes beyond reason to suggest that the Burgetts' statement in their brief that they had not had an opportunity to plead their potential defenses (see page 9 of the Petition) and the Bank's casual reminder that due process does not provide an iron-clad guarantee that one will always have such an opportunity put the New Mexico Supreme Court on notice that a federal constitutional challenge was being mounted to the state's time-honored manner of effecting substituted service. The one and only point argued by Petitioners on appeal was that:

> THE DISTRICT COURT'S FINDING AND RULING THAT PROPER SERVICE WAS MADE UPON THE APPELLANTS WAS CLEARLY IN CONFLICT WITH THE EVIDENCE AND THE DEFAULT JUDGMENT ENTERED AGAINST THE APPELLANTS SHOULD BE SET ASIDE.

Even where clear attacks are made on state statutes for violations of "due process" the assumption is that the state and not the Federal Constitution was being relied upon. *New York ex rel, Bryant v. Zimmerman*, 278 U.S. 63 (1928); 233 U.S. 658 (1914); *New York Central and H. R. Co. v. New York*, 186 U.S. 269, 273 (1902). This is especially true where the state constitution has a due process clause as does New Mexico's Constitution. Article II, Section 18, Constitution of New Mexico.

The New Mexico Supreme Court certainly did not rule on any federal question. Its decision merely recites

that there was substantial evidence to support the trial court's finding "that notice was properly given by posting process on the most public part of appellant's usual place of abode. . ." See Appendix D of the Petition. Petitioners' entire appeal in state court was based on denial of their motion to set aside the judgment. This motion is set out at Appendix A to this response and indicates a purely factual dispute as to what their usual place of abode was at the time of service of process. More importantly, the Motion For Rehearing set out at Appendix B to this response indicates that Petitioners understood the case to be solely a "substantial evidence" case. The fact that no federal question was raised in the Motion For Rehearing forecloses any jurisdiction in this Court to review the constitutionality of New Mexico's service of process statute "as construed". *Brinkerhoff-Faris Trust Co. v. Hill,* 281 U.S. 673, (1930). *Missouri ex rel, Missouri Ins.Co. v. Gehner,* 281 U.S. 313, (1930).

In summary, there is no indication that the New Mexico Supreme Court was interpreting 21-1-1 (4) (e) (1) N.M.S.A., (1953) in the light of the United States Constitution and therefore, this Court may not review its decision. *Beck v. Washington,* 369 U.S. 541, 549-550 (1962). This Court will not and cannot pass upon the constitutionality of a state statute before the state courts have had an opportunity to do so. *Adler v. Board of Education,* 342 U.S. 485, 496 (1952), and *N.L.R.B. v. Seven-Up Co.,* 344 U.S. 344, 350 (1953). New Mexico's service of process statute is fundamental to its entire system of administration of justice and any attack on its constitutionality should be made in New Mexico's own courts in a clear, direct manner so that the issue can be fully and thoroughly briefed to the extent such an important question warrants. Had the New Mexico Supreme Court been aware that it was faced with so important a question in this case it is fair to assume the matter would have received more attention from the court than it did. There was in fact no federal question presented below and there is nothing for this Court to review. The Petition should be denied.

Point 2. NEW MEXICO'S SUBSTITUTED SERVICE STATUTE COMPLIES WITH THE DUE PROCESS REQUIREMENTS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Mandatory personal service of process is the only method of guaranteeing actual notice of a law suit against an adversary. Such a requirement would create a great injustice to those seeking the courts to settle disputes and achieve legal remedies. Debt collection, foreclosure of mortgages, and all quasi in rem causes of action could be easily thwarted by defendants avoiding personal service of process. Such is not the law now, nor has it ever been the law. *Nelson v. Chicago, B. & Q. R. Co.,* 80 N.E. 109 (1907).

Due process of law as required by the Fourteenth Amendment to the United States Constitution demands that service of process in any proceeding is notice that is reasonably calculated under all the circumstances of the pendency of the action that affords the defendant an opportunity to present his objections. *Mullane v. Central Hanover Bank and Trust Co.,* 339 US 306 (1950). Where personal service can not be obtained, the substitute that is the most likely to reach the defendant is required if substantial justice is to be done. *McDonald v. Mabee,* 243 US 608 (1917).

Each case that involves substituted service of process must be examined in its entirety to determine all the facts and circumstances of the method of service that was used, with any decision as to satisfactory or unsatisfactory adherence to due process requirements to be made upon the evidence found by the trier of fact. Where substituted process on residents of the forum has been used, each case has been examined by the appellate courts of the state[1] and

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[1] *Decher v. Gwinn,* 20 S.E. 240 (Ga. 1894); *Nelson v. Chicago, B. & Q. R. Co.,* 80 N.E. 109 (Ill. 1907); *Williamson v. Taylor,* 122 S.E. 530 (W. Va. 1924); *John Hancock Mut. Life Ins. Co. v. Cooley,* 83 Pacific 2d 221 (Wash. 1938); *Holtberg v. Brommersbach,* 52 N.W. 766

federal[2] courts to determine if, as a factual matter, due process was provided. Where the facts, as found by the trial court, have been found to be supported by substantial evidence, the appellate courts have affirmed the method of substituted service of process used. When the decision of the trial court was not supported by the evidence, the appellate courts have been quick to quash the service of process. The New Mexico Appellate Courts have been assiduous in enforcing due process requirements in interpreting and applying 21-1-1 (4) (e) (1), N.M.S.A., (1953) as it realtes to substituted service of process.[3]

In each of the seven cases that have been brought to the attention of the New Mexico Supreme Court involving the issue of substituted service of process, the New Mexico Supreme Court has carefully examined the facts as found by the trial court and determined whether substantial evidence existed to support the lower court findings and

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(Minn. 1952); *Rash v. American Federation of Labor*, 116 N.W. 2d 175 (Minn. 1962); *Spiegelman v. Birch*, 129 S.E. 2d 119 (Va. 1963); *Gunning Light & Supply Co. v. Gunning Electric Co.*, 100 A. 2d 495 (Conn. 1963); *Houden v. Hubbell*, 80 N.M. 764 (1969); *Vann Tool Co. v. Grace*, 90 N.M. _____ (1977) filed July 6, 1977, opinion reported 16 N.M. Bar Bull. No. 21, Page 1905.

2 *Nations v. Johnson*, 65 U.S. (24 How.) 628 (1861); *Earle v. McVeigh*, 91 U.S. 398 (1876); *McDonald v. Mabee*, 243 U.S. 608 (1917); *Milliken v. Meyer*, 311 U.S. 457 (1940); *First National Bank & Trust Co. of Tulsa. v. Ingerton*, 207 Fed 2d 793 (10th Cir. 1953).

3 *Spiegelberg v. Sullivan*, 1 N.M. 575 (1873) affirming substituted service of process; *Vigil v. Pradt*, 5 N.M. 161 (1889) quashing manner of substituted service; *Bell v. Gaylord*, 6 N.M. (Gild.) 227 (1891) affirming manner of substituted service; *Houden v. Hubbell*, 80 N.M. 764 (1969) quashing manner of substituted service; *Household Finance Corporation v. McDevitt*, 84 N.M. 465 (1973) quashing manner of substituted service; *Federal Land Bank of Wichita v. Burgett*, 90 N.M. _____ (1977) filed June 13, 1977, and unreported, rehearing denied June 30, 1977, unreported, affirming method of substituted service of process; *Vann Tool Co. v. Grace*, 90 N.M. _____ (1977), filed July 6, 1977, opinion reported 16 N.M. Bar Bull. No. 21, Page 1905, July 14, 1977, quashing manner of substituted service.

conclusions,[4] while at the same time construing the New Mexico substituted service of process statute strictly.[5] In each case affirming the method of substituted service of process used[6] and in each case where substituted service of process was quashed,[7] the New Mexico Supreme Court decision has turned on (a) evidence that the process server made an actual determination that the defendant still lived in the premises; (b) the party defendant was only temporarily absent from the premises in which he lived; (c) the process server determined the most public part of the premises where the defendant lived, i.e. the most heavily used entrance to the house; (d) no one was present at the premises and house who was willing to accept the service of process; and (e) the return of service shows attachment was made to the "usual place of abode" of the defendant.[8]

The New Mexico Supreme Court has adopted its definition of "usual place of abode" from the West Virginia case of *Williamson v. Taylor*, 122 S.E. 530 (1924)[9] wherein the West Virginia court defined the term as follows:

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4 Supra f.n.3.

5 *Household Finance Corporation v. McDevitt*, supra.

6 *Spielgelberg v. Sullivan*, supra, where defendant absconded and was avoiding service of process; *Bell v. Gaylord*, supra, where defendant absent from his home and premises; *Federal Land Bank of Wichita v. Burgett*, supra, the instant case.

7 *Vigil v. Pratt*, supra, process posted on former residence of defendant 50 miles from usual place of abode; *Houden v. Hubbell*, supra, improper identification of defendant as party to suit; *Household Finance Corporation v. McDevitt*, supra, defendant separated from husband and moved to another abode; *Vann Tool Co. v. Grace*, supra, where defendants had moved from house they still owned prior to service.

8 Supra f.n. 6 and 7.

9 *Household Finance Corporation v. McDevitt*, supra.

> "Under the statute the usual place of abode' means customary place of abode at the very moment the writ is left posted; hence, where the writ is left posted at a former place of abode, but from which defendant had, in good faith, removed, and taken up his place of abode elsewhere, service so had is ineffective and invalid."

This definition was reaffirmed and quoted with approval by the New Mexico Supreme Court a few weeks following the disposition of this instant case before the New Mexico Supreme Court in the case of *Vann Tool Co. v. Grace*, 90 N.M. _____ (1977) filed July 6, 1977, opinion reported 16 N.M. Bar Bull. No. 21, Page 1905, July 14, 1977.

As each case in New Mexico relies on its own individual facts, nothing would be gained by having this Court review this particular case. A decision resting on substantial evidence is particularly inappropriate for this Court's consideration. No substantial nor major question of importance exists as to the use of the New Mexico Statutes and its application pursuant to the New Mexico Constitution and the United States Constitution.

Point 3. SERVICE ON THE "USUAL PLACE OF ABODE" SATISFIED UNITED STATES CONSTITUTIONAL DUE PROCESS.

Since the Petitioners are residents of the state of New Mexico, and this action was originally brought before the New Mexico courts on a foreclosure of mortgage on New Mexico real estate, New Mexico's constitution and laws must first be applied and interpreted. Application and interpretation of the New Mexico Constitution and laws should first be addressed by the New Mexico courts. On the question of proper substituted service of process, each state has traditionally been free to provide its own methods of substituted service of process on its own residents so long as those methods of substituted service of process comport with traditional notions of fair play and

substantial justice.[10]

Each state may determine for itself what method of substituted service of process may be used within its own boundaries.[11] Each resident of the state is thus bound to the laws of that state[12] and the methods of substituted service of process provided for if those methods meet the tests of providing due process of law.[13]

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10 *Milliken v. Meyer*, 357 U.S. 457 (1940).

11 *Blackmer v. United States*, 284 U.S. 421 (1932); *Milliken v. Meyer*, supra; *Bell v. Gaylord*, 6 N.M. 227 (1891); *Nelson v. Chicago, B. & Q. R. Co.*, 80 N.E. 109 (1907), where it was stated:

> It is also held that each state may determine for itself in what method process may be served upon its citizens within its own boundaries, and, while such legislation will have no force outside the state, service of process within the state in the manner pointed out in the statute regulating the method of obtaining such constructive service of process, if the method of service of process provided for is such as to amount to due process of law, as these terms are used in the state and federal Constitutions, will be sufficient to authorize the courts of the state within whose jurisdiction the service of process is had to pronounce a personal judgment or decree against a defendant so served with process, although cases may arise in practice upon such constructive service of process where a personal judgment or decree might be obtained against a defendant without such defendant having received actual notice of the pendency of the action prior to judgment or decree. Constructive service of process, it is said, is authorized in a certain class of cases, such as when the defendant has gone out of the state, or when he cannot be found, or when he conceals himself, so that process cannot be served upon him, as the result of necessity; that is, such constructive service of process is substituted for actual service of process when actual service of process cannot be had upon a defendant.

12 *Milliken v. Meyer*, supra.

13 *Nelson v. Chicago B. & Q. R. Co.*, supra.

Substituted service of process by posting on the door of the "usual place of abode" is reasonably calculated to give actual notice of the proceedings. The rule and its underlying reason was most succinctly stated in *Earle v. McVeigh*[14] wherein the court stated:

> "When the law provides that notice may be posted on the 'front door of the parties usual place of abode,' in the absence of a family, the intention evidently is that the person against whom the notice is directed should then be living or have his home in the said house. He may be temporarily absent at the time the notice is posted; but the house must be his usual place of abode, so that when he returns home, the copy of the process posted on the front door will operate as notice; which is all that the law requires. By the expression, 'the usual place of abode,' the law does not mean the last place of abode; for a party may change his place of abode every month in the year. Instead of that, it is only on the door of his then present residence where the notice may be posted and constitute a compliance with the legal requirement."[15]

The trial court in this case did find that the service of process attached to the Burgetts' door was on the door of their "then present residence". Constitutional due process was accorded the Defendants in this case and is so accorded in New Mexico to all defendants served pursuant to 21-1-1 (4) (e) (1) N.M.S.A., (1953).

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[14] 91 U.S. 398 (1876)

[15] 91 U.S. at 400

CONCLUSION

Certiorari should not be granted because the questions presented in the Petition were not presented before the courts of New Mexico. No federal question of importance has been presented since process was made in a manner most reasonably calculated to give notice of the law suit commenced. New Mexico can determine what is the most suitable method of substituted process for its residents where due process is provided.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF OTERO COUNTY,

NEW MEXICO TWELFTH JUDICIAL DISTRICT

THE FEDERAL LAND BANK OF WICHITA a corporation,	)	
Plaintiff,	)	
vs.	)	No. 17472
E. B. BURGETT, ET AL, Defendants	)	

MOTION

COMES NOW, E. B. Burgett and Winnie Burgett, his wife, appearing specially and moves the Court to set aside the Judgment herein and for a stay of the pending sale of the real properties which are the subject matter of this lawsuit and as grounds therefore, state:

1. That no proper service of process was ever had on these Movents.

2. That service was attempted on or about the 19th day of November, 1976, by the process server affixing to the front door of the Movents former residence, in Otero County, New Mexico, a copy of the suit papers and Summons.

3. That at least one month prior thereto these Movents had removed from said residence and established their general place of abode in Artesia, Eddy County, New Mexico. All is more particularly set out in the Affidavit of the Movents which is attached hereto as Exhibit 'A' and made a part of this Motion.

4. That no other attempts of service of process have been made upon these Movents.

5. That said process server was advised at the time he affixed the suit papers to the door that these Movents

resided in Artesia.

6. That these Movents believe that a sale of said real property which was the general subject matter of the action, is scheduled for Monday, September 13, 1976, at 10:00 o'clock a.m. at the courthouse in Alamogordo, New Mexico.

7. That irreparable harm and damage will result to these Movents if said sale be consummated.

/s/ Ronald M. Higginbotham
Ronald M. Higginbotham
Attorney for Movents
P.O. Box 2011
Roswell, New Mexico 88201

I hereby certify that a copy of the foregoing pleading was mailed to opposing counsel of record on this 9th day of September, 1976.

/s/ Ronald M. Higginbotham
Ronald M. Higginbotham

IN THE DISTRICT COURT OF OTERO COUNTY,
NEW MEXICO TWELFTH JUDICIAL DISTRICT

THE FEDERAL LAND BANK OF WICHITA, a corporation,

Plaintiff,
vs.

E. B. BURGETT, ET AL,
Defendants,.

No. 17472

STATE OF NEW MEXICO
ss:
COUNTY OF EDDY

AFFADAVIT

COMES NOW the undersigned, of lawful age and upon their oath state:

1. That they have recently learned that they are the Defendants in the above styled and numbered cause.

2. That they were never served with process in said cause.

3. That on or about the 20th day of October, 1975, the undersigned removed their residence and general place of abode from Mayhill, Otero County, New Mexico, to Artesia, Eddy County, New Mexico.

4. To the undersigned's best knowledge and belief service of process was attempted on the undersigned on or about the 19th day of November, 1975, by affixing a copy of the Summons and Complaint to the undersigned's former abode, in Mayhill, Otero County, New Mexico.

5. No other notice or attempt of service was made upon the undersigned in said cause.

6. That on or about the 26th day of August, 1976, a copy of the final decree in said cause was delivered to the undersigned by certified mail, addressed to, 2700 Washington, Artesia, New Mexico 88210

/s/ E. B. Burgett
E. B. Burgett

/s/ Winnie Burgett
Winnie Burgett

SUBSCRIBED AND SWORN TO before me this 9th day of September, 1976, by E.B. Burgett and Winnie Burgett, his wife.

/s/ Elaine Watson
Notary Public

My Commission Expires:

April 3, 1978

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

THE FEDERAL LAND BANK OF WICHITA

Appellee-Plaintiff,

vs.

No. 11304

E. B. BURGETT and WINNIE BURGETT, et al

Appellants-Defendants.

MOTION FOR REHEARING

Comes now the Appellants-Defendants and, pursuant to Rule 19, Rules Governing Appeals, Section 21-12-19, N.M.S.A., 1953 (1976 Interim Supp.), moves this Court for a rehearing on the following grounds:

(1) The Court's decision that the District Court's finding that process was properly posted at Appellants-Defendants', E. B. Burgett and Winnie Burgett, usual place of abode has overlooked the factual basis of that finding. The evidence supporting the District Court's decision was: Appellants-Defendants leaving furniture at the house where service was posted; that the house was not rented to anyone for one or two months after the Appellants-Defendants left; that the renters only stayed for one or two months before leaving the house; the Appellee-Plaintiff's speculation that E. B. Burgett's doctors did not tell him he could not return to the Cloudcroft area until sometime after November 19, 1975; and the testimony of the Cloudcroft sheriff, Rex Briscoe, who, when asked if in November of 1975, whether he knew where the Appellants-Defendants lived stated "Not directly.", and then went on to recite that he had seen E. B. Burgett at the post office in Cloudcroft but did not remember when (Tr.

132). If the evidence of record is re-evaluated, the Court will find that the trial court's findings are not supported by substantial evidence and, thus, its denial of the Motion to Vacate should be reversed.

(2) This Court in its decision has entirely overlooked and misapprehended the principles as stated in *Household Finance Corporation v. McDevitt,* 84 N.M. 465, 505 P.2d 60. In that case, there was also evidence that the place where service was made was the defendant's usual place of abode. First, the defendant still had furniture at the house where substituted service of process was made, the defendant was still married to her husband who still lived at the house where the service was made, the defendant had only left this house a few weeks before service was attempted, and finally, the defendant had only moved into a temporary residence with a friend until she found a permanent house which she did not find until after service was made. The Court stated on Page 467 in *Household Finance Corporation v. McDevitt,* supra:

> "Defendant's claimed intention to change the usual place of abode from the Constitution Road address is substantiated by the fact that defendant never returned to the address to live, plus the fact that the parties defendant were subsequently divorced. Consequently, the Constitution Road address was not 'usual place of abode' of the appellant at the time of service of process."

This Court in its decision has further overlooked or misapprehended the principle as stated in *Household Finance Corporation v. McDevitt,* supra, in which this Court stated that any statute authorizing substituted service of process "is to be strictly construed."

(3) This Court in its decision has entirely overlooked the evidence found in the testimony of E. B. Burgett in which he testified that he moved from the Cloudcroft residence, which is the abode where Appellee-Plaintiff attempted substituted service, and moved to Artesia in Oc-

tober of 1975 and continued to reside there until the District Court hearing which was held on September 17, 1976 (Tr. 125). The Appellee-Plaintiff did not attempt service until November 19, 1975.

WHEREFORE, the Appellants-Defendants request that this Court reconsider its Opinion as filed June 13, 1977, and allow the Appellants-Defendants a full rehearing for those three specified areas where important evidence and controlling New Mexico case authority have been overlooked or misapprehended to the very grave detriment of the Appellants-Defendants.

Respectfully submitted,
STAGNER, HIGGINBOTHAM & OAS

By /s/ Keith R. Oas
Attorneys for the Appellants-Defendants
P. O. Box 1513
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